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No. 93-1280

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

NICHOLAS L. BIANCO, LOUIS R. FAILLA,
GAETANO J. MILANO and FRANK A. PUGLIANO,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

GAETANO J. MILANO, LOUIS R. FAILLA, NICHOLAS L. BIANCO AND FRANK A. PUGLIANO[1] have petitioned this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit upholding their convictions for RICO and related offenses. A1 et seq..

This reply brief is addressed to the government's contentions on Petitioners' first question:

> 1. Are the good faith exceptions to the Fourth Amendment's exclusionary rule applicable to Title III's exclusionary rules, 18 U.S.C. §§ 2515, 2518(10)(a)?

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[1]The government correctly notes that the Title III standing issue (question four) raised by petitioners Bianco and Pugliano is dependent upon this Court granting certiorari on at least one of petitioners' substantive challenges to the Title III warrant (questions one and two). Gov. Opp. at 16 n.9.

This issue was raised by the findings and rulings of the District Court, affirmed by the Court of Appeals, that, in applying for a "roving bug" warrant, the government wrongly failed to disclose that it had probable cause to install the listening device at a particular location at a particular time, facts which militated against the issuance of a "roving" warrant. A. 36-38, 71-76, 149-150, 174-175, 180-182, 187-188.

The question then became whether this non-disclosure was a violation of Title III requiring suppression of the evidence seized: a sensational tape recording of a Cosa Nostra induction ceremony.

The government's brief--by attempting to relitigate issues which it

has already lost or conceded in the courts below--obscures the only issue remaining: whether its violation of Title III may be excused by importing a Fourth Amendment "good faith" exception into Title III's exclusionary rules. We do not repeat the arguments in our petition at pages 20-31 as to why this issue should be addressed by this Court. Rather, we show how the government focuses on matters not germaine to the petition.

First, the government asserts that it never violated the "full and complete statement" requirement of the "roving bug" provision of Title III, 18 U.S.C. § 2518(11)(a)ii) and that we were derelict in not taking the time in our petition to argue the point. Gov. 12-13. But the government lost this issue below. The

District Court found, based on specific facts, that this provision had been violated, A. 149-150, 187-188, and, notwithstanding the government's renewed protests before the Court of Appeals,[2] the Court of Appeals "agree[d] with the District Court's application of Franks" (which presupposed a statutory violation) and further agreed with the District Court that "the government should have disclosed to the court the information relating to 34 Guild Street . . .." A. 71-72, 75.

Given these holdings in the Court of Appeals, and given the government's

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[2]In a subsection of the government's brief to the Second Circuit entitled, "The Application for the Roving Order Entered in this Case Complied With the Statutory Requirements of 18 U.S.C. § 2518(11)," the government argued that the statute did not require it to disclose the information about 34 Guild Street to the issuing judge.

concession before that court that Franks' good-faith exception only came into play if the court found a violation of 18 U.S.C. § 2518(11)(a)(ii),[3] it engages in unseemly hairsplitting here by asserting that "the court of appeals did not explicitly conclude that the government had violated that section." Gov. Opp. at 12, emphasis added. While this court could reverse the District Court and the Second Circuit on this issue were it to grant our petition, those courts' conclusion that the government violated Title III is not honestly in question.

A second issue not honestly in question, but to which the government

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[3]At pages 141-144 of its brief to the Second Circuit, the government argued that "if a statutory violation is found, suppression is not appropriate" because of the saving provisions of a Franks analysis. Emphasis added.

likewise misdirects this court's attention, is whether the breached provision--the "full and complete statement" requirement of 18 U.S.C. § 2518(11)(a)(ii)--is a "central" provision of Title III, the violation of which requires suppression. United States v. Giordano, 416 U.S. 505, 527-528 (1974).

While appearing to concede--as it did in the Court of Appeals[4]--that this section does "play a central role in the statutory framework," Gov. Opp. at 14, the government misreads United States v. Donovan, 429 U.S. 413 (1977) as construing a Franks-like exception into the statutory bright-line rule of

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[4]At page 142 of its brief to the Second Circuit, the government conceded that "the showing of impracticality [required by § 2518(11)(a)(ii)] is central, as that term is used in United States v. Chavez, 416 U.S. 562 (1974)."

suppression. That exception, according to the government, is that suppression is not required where a reviewing court finds that, had the central provision not been violated, the warrant would still have issued. Gov. Opp. at 14-15.

The government is dead wrong; nowhere in Donovan did this Court read such an exception into Title III. In Donovan, as the government itself is aware (Gov. Opp. at 12 n.6), this Court ruled that violation of Title III's "naming" provision, 18 U.S.C. § 2518(1)(b)(iv), did not warrant suppression for one reason and one reason only: because that provision did not--by contrast with the provision in issue here--"play 'a central, or even functional, role in guarding against unwarranted use of wiretapping or

electronic surveillance.'" Id. at 436-437.

Setting aside the government's diversionary sallies, the question remains squarely before this Court: where, as here, a central provision of Title III is violated, is suppression still required under this Court's bright-line construction of Title III's exclusionary rules[5] or should a Fourth Amendment-derived "good faith" exception now be read into those rules?

We have shown in our Petition how the applicability of Fourth Amendment exceptions to Title III's exclusionary rules has generated disagreement in the lower courts. The government urges that

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[5]United States v. Donovan, 429 U.S. 413, 437 (1977); United States v. Chavez, 416 U.S. 562, 574-575 (1974); United States v. Giordano, 416 U.S. 505, 527 (1974).

the issues presented in these cases all involved "distinct questions," making review unnecessary here. Gov. Opp. at 15-16.

But the overriding question in each of these cases--whether judge-made constitutional exceptions should be incorporated into Congress' electronic surveillance statute--goes to the very heart of the separation of powers on one of the most sensitive issues confronting the courts and law enforcement today.

Given the importance of this overriding question, this Court should not recognize any artificial distinction among the Franks "good faith" exception applied here, A. 301-302, the Leon "good faith" exception,[6] the mutant Coolidge

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[6]United States v. Spadaccino, 800 F.2d 292, 296 (2nd Cir. 1986).

"inadvertant overhearing" exception,[7] and the Jacobsen "innocent recipient" exception.[8] The diverse holdings in these cases show a genuine need for this Court's guidance.

CONCLUSION

For the reasons given in their petition, as amplified above, Petitioners pray that this Court grant their petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit affirming their convictions.

Respectfully submitted,

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Counsel of Record

April 22, 1994.

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[7] United States v. Baranek, 903 F.2d 1068, 1071-1072 (6th Cir. 1990) and Id. at 1072-1073 (Jones, J., dissenting).

[8] United States v. Vest, 813 F.2d 477, 481-482 (1st Cir. 1987).